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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, *Ex Rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY TO GOVERNMENT'S BRIEF *AMICUS CURIAE*

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Bausch & Lomb Optical Company, et al.

SIMPSON THACHER & BARTLETT,
Of Counsel.

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

against

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

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We respectfully ask leave to comment on several matters in the Government's brief *amicus curiae,* received after our brief was printed. All other matters are adequately covered in our main brief.

I

(A.)

After an elaborate analysis of the proceedings in the District Court (Gov't. Br. pp. 3-16) Government counsel contend that the record upon which this case was decided below should not be considered by this Court in its en-

tirety. It is their contention that the Court should disregard respondents' affidavits (which compel affirmance) and consider only the proposed amended complaint. Despite this position they themselves are not averse to piecing out or bolstering the proposed amended complaint by using excerpts from the anti-trust proceedings—matter which on their own theory would be equally *dehors* the record.

It is clear that Government counsel are in error as to what the District Court passed upon. The moving affidavit of respondents' counsel (R. 49-53), annexed to the order to show cause dated January 14, 1942 (R. 46-48), expressly asked that the proposed amended complaint "* * * be considered * * * upon the motions brought on by the earlier order to show cause as an admission by the plaintiffs and for all purposes except as an amended complaint" (R. 50). The recitals in the order and judgment granting summary judgment to these respondents expressly state that the proposed amended complaint was before the District Court and was considered by it (R. 260). The Court below likewise weighed the entire record and concluded that the proposed amended complaint like the original was subject to summary judgment. As appears from its regular course of dealing with summary judgment cases, it is implicit in the decision of the Court below affirming summary judgment dismissing the complaint that on the basis of the evidence adduced, an amended complaint could not have been framed which would not itself be subject to successful attack by motion for summary judgment. *Seaboard Terminal Corporation* v. *Standard Oil Co.*, 104 F. (2d) 659 (C.C.A. 2, 1939); *Rossiter* v. *Vogel*, 134 F. (2d) 908, 912 (C.C.A. 2, 1943); Cf. *Downey* v. *Palmer*, 114 Fed. (2d) 116 (C.C.A. 2, 1940).

Accordingly, their argument as to the record is plainly erroneous, for this Court cannot properly exclude from consideration affidavits upon which the decision below was based. The consequences of such affidavits are adequately described in our main brief.

(B)

Government counsel also misapprehend the nature of the proceedings under Rule 56 (Gov't. Br. pp. 21-2) in their observations about the evidence required by that rule. It is suggested that while the anti-trust proceedings were not admissible evidence, still they were to be given some weight especially when compared with the affidavits of those who were alleged "conspirators". Such a contention ignores the fundamental principle that there is no weight of evidence problem in a summary judgment case; either a genuine triable issue has been created by the presentation of admissible evidence or it has not.

II

(A)

Our main brief points out why this case does not involve a competitive bidding problem. It is worthy of note that Government counsel point to no evidence or considerations which would support the conclusion that the Army and Navy considered Carl Zeiss of Jena as a source of military optical instruments, much less that they viewed it as a potential competitive bidder.

(B)

We likewise showed in our main brief that the 1921 and 1925 agreements were terminated by the 1926 agree-

ment. The Government makes no claim that the 1926 agreement violates the provisions of the Informer's Act. Its argument is entirely predicated upon allegations unsupported by evidence that the 1921 and 1925 agreements survived the 1926 agreement. No evidence in the record justifies any such inference. These respondents have affirmatively established that neither in 1925 nor at any other time were protective offers made in any transactions with the United States to which Bausch & Lomb was in any way a party, and petitioners have failed to adduce any evidence to the contrary.

Moreover, Government counsel, like petitioners, disregard the true nature of the agreements between the parties. None of these agreements resembles the type of agreements aimed at blocking or defeating competitive bidding requirements which are considered in the cases cited by them.

III

Government counsel argue upon the basis of decisions and statutes which do not include the restrictive language involved in this statute, that the word "fraud" is broader than "common law deceit" and, therefore, that the interpretation of the present statute by the court below was wrong. The word "fraud" is not to be found in the Informer's Act, and, of course, the court below was not called upon to construe the Act as if that word was used. Since the statute relates to "false, fictitious or fraudulent" claims the court below sought to determine what was meant by that language. It properly took the view that those three words when used in juxtaposition share in common the notion of deceit.

In seeking to expand the familiar meaning of the words used in this statute, Government counsel have placed considerable emphasis on Section 37 of the Criminal Code (18 U. S. C. Sec. 88) which proscribes conspiracies to defraud the United States "in any manner or for any purpose". This contention overlooks the fact that the agreement or conspiracy to defraud which is denounced in the third clause of R.S. §5438 (Resp. Br. pp. 49-50) is one to defraud by the use of "false or fraudulent claims". Thus, it would read out of the statute these words of limitation, an excision which would seem to render their separate existence unnecessary. It is implied that the interpretation by the court below was due to its distaste for *qui tam* actions (Gov't. Br. p. 27). This suggestion ignores the statement by the court below, that "This [interpretation] would be the necessary result were the statute of the usual kind and entitled to a broad interpretation * * *" (R. 268).

The Government argues alternatively that the elements of common law fraud and deceit were present because of alleged concealment of the agreements between Zeiss and Bausch & Lomb. Among other difficulties with this argument, it overlooks the basic requirement in fraud cases dealing with concealment, that concealment constitutes deceit only where there is a duty of disclosure. Cf. *United States* v. *Groves*, 122 F. (2d), 87, 90 (C.C.A. 2, 1941).

Respectfully submitted,

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